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The Quality of Mercy *Is* Strained: How the Procedures of Sexual Harassment Litigation against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession

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THE QUALITY OF MERCY IS STRAINED: HOW THE
PROCEDURES OF SEXUAL HARASSMENT LITIGATION
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SUBSTANTIVE LAW OF TITLE VII AND THE INTEGRATION
OF AN ETHIC OF CARE INTO THE LEGAL PROFESSION

JAY MARHOEFER*

INTRODUCTION

Mention the term “sexual harassment” to a layperson and a variety of possible responses, some more emotionally charged than others, might ensue. The term incites fear in employers, disgust in feminists, and ambivalence among many in the workforce. Lately, the term seems to result in head scratching among legal scholars and judges. *We thought the issue was settled after Faragher¹ and Ellerth,²* they seem to be saying. *So why has the law become more difficult to define and apply?*

The quest to answer this question has resulted in a renaissance, of sorts, for legal scholarship related to sexual harassment. Presently, the focus is on two issues. The primary debate asks: What makes sexual harassment sex discrimination under Title VII?³ Three competing theories exist.⁴ The first qualifies sexual harassment as discrimination because it is conduct that would not have been undertaken “but for” the plaintiff’s sex.⁵ The second views the sexual

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1. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court held that employers were subject to vicarious liability under Title VII for sexual harassment perpetrated by their employees, but could raise an affirmative defense based on the employer’s conduct in seeking to prevent and correct harassing conduct.

2. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), decided the same day as *Faragher*, the Supreme Court held that hostile environment sexual harassment and quid pro quo sexual harassment were equivalent for the purpose of establishing employer liability.

3. Title VII prohibits discrimination in hiring, firing, compensation or terms, condition, or privileges of employment on the basis of sex, among other characteristics. 42 U.S.C. § 2000e-2(a)(1) (2003).

4. Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

5. *Id.*

nature of the behavior as the reason for violating Title VII.⁶ The third (and probably the most radical of the theories) is that sexual harassment reinforces and perpetuates gender “norms” related to masculinity and femininity, and in doing so, results in discrimination.⁷ Advocates of each of these hypotheses passionately argue their viewpoints and critique the viewpoints of others entirely from a perspective of substantive law and feminist legal theory.

A second, though ancillary, debate asks: What is the appropriate balance between regarding sexual harassment as discrimination from a Title VII perspective and as a dignitary tort from a common law perspective?⁸ Proposed answers to this question range along a continuum that at one end views sexual harassment as entirely a personal tort,⁹ and at the other end, entirely as workplace discrimination.¹⁰ One emerging perspective, however, views sexual harassment as both discrimination and a dignitary tort occurring simultaneously.¹¹ This debate focuses on the nature of the wrong (which varies from sexual innuendos to sexual assault), the environment in which the wrong occurs, and the rulings of courts.

Remarkably absent from this pantheon of recent legal scholarship is a discussion of the procedure of sexual harassment litigation. The seminal articles and their progeny dedicate themselves to discussing *what* the substantive law is, *why* the law is what it is, and what the law *should be*. The titans of today’s sexual harassment scholarship examine, in some cases exhaustively, the facts, holdings, and reasonings of many cases within various theoretical contexts of feminism, the workplace, and the nature of discrimination. What is not discussed is how the *procedure* of adjudicating sexual harassment claims—the grueling, exhausting, and frustrating toils of plaintiffs, ranging from the attempts to procure an in-house remedy to the collection of judgments—clarifies the substance of the law.

6. *Id.*

7. *Id.*

8. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 3 (1999). Ehrenreich, for example, believes that law and legal scholarship has placed an “excessive focus” on the discriminatory aspects of sexual harassment and that this focus on Title VII “must be balanced by an equal focus on the dignitary harm aspects of harassment.” *Id.* at 5.

9. Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 376 (1998).

10. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 88 (1979).

11. Ehrenreich, *supra* note 8, at 16.

An examination of the long, complicated, and messy process that is sexual harassment litigation leads to two conclusions, one unfortunate and the other unforgivable. The first conclusion, which is unfortunate, is that the actual process of sexual harassment litigation is determinative in answering the discrimination versus dignitary tort question. Although judgments are entered against both individual harassers (for tort claims) and their employers (for discrimination claims), the financial and disciplinary consequences that follow these judgments disproportionately befall the individual. Here, as the rules are currently written and applied, sexual harassment looks, feels, and smells like a tort. The second conclusion, which is unforgivable, is that the legal system itself contributes to sex discrimination because of procedural inequities faced by sexual harassment plaintiffs. If a just result is achieved by applying fair and consistent (though not inflexible) procedures to substantive law, and an unjust result is achieved by applying procedures that are unfair and inconsistent, then the legal system itself has become an unwilling codefendant, rather than impartial adjudicator, of sexual harassment claims.

Nowhere are these procedural flaws clearer than in the legal profession itself, and for this reason the journey of female attorneys who experience sexual harassment within law firms will be illustrative in this discussion. Sexual harassment within law firms amplifies the procedural problems for a variety of reasons. First, litigation against law firms represents the one example in which everyone—the parties, their attorneys, administrators, and jurists—knows the substantive law, or at least has the acumen to research and interpret it. Second, the occurrence of sexual harassment within the legal profession is widespread and is perhaps more pervasive than in other professions.¹² This incidence is a great irony, and law firms have been compared to the “cobbler’s children” because the advice firms give to clients to avoid sexual harassment litigation is often not heeded by the firms themselves.¹³ Third, plaintiffs in sexual harassment suits against law firms are likely to be more internally conflicted than most, having invested significant time, money, and energy in receiving a law degree. They must confront the prospect of losing a job they might otherwise love if not for the boorish behavior of one or more indi-

12. See, e.g., A.B.A. COMM’N ON WOMEN IN THE PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 18–19 (1995) [hereinafter A.B.A. COMM’N ON WOMEN, UNFINISHED BUSINESS].

13. Johnny Darnell Griggs, *Sexual Harassment in Law Firms: The Cobbler’s Children Revisited*, N.J. LAW., Aug. 2001, at 35.

viduals and the existence of an “old boys” atmosphere. Fourth, the adjudicators in these types of proceedings—administrators and judges, whether male or female—are usually products of the same system. The notion of sex discrimination as the result of gender stereotype reinforcement becomes more cogent when it extends to those responsible for enforcing its elimination. Fifth, the David versus Goliath aspect of one person against an entire company (or firm) desperate to maintain the status quo takes on even greater significance when the defendant law firm and its defense counsel are natural allies. This relationship can lead to a type of *Götterdämmerung* in which a firm will obstruct collection of judgments by the prevailing plaintiff but ensure that its defense counsel is paid. This alliance between defendant law firms and their defense counsel carries favor that is likely to be reciprocated once the dust has settled.

The reality in one particular case—*Rochester v. Fishman*¹⁴—is illustrative of both the procedural defects of sexual harassment litigation and how these defects are amplified in the law firm setting. In 1998, a jury in the Northern District of Illinois returned a verdict of \$1.4 million for the plaintiff, RoxAnne Rochester, which at the time was the largest award for sexual harassment damages to a single plaintiff in Illinois’ history.¹⁵ Rochester’s award consisted of damages from her former law firm, Fishman & Merrick, for Title VII violations, and from the individual defendant, Gerald Fishman, for tort claims.¹⁶ The jury trial took place eight years after the harassing conduct began.¹⁷ It was not until late 2002 that Rochester collected even a portion of her judgment from the defendant law firm for the Title VII damages.¹⁸ No disciplinary actions of any type were initiated against Fishman until the Illinois Attorney Registration and Disciplinary Committee did so in late 2001, which was three years after the verdict and eleven years after the offensive conduct began.¹⁹

14. *Rochester v. Fishman*, No. 95-CV-3896 (N.D. Ill. 1998).

15. *Rochester*, Jury Verdict No. 800648, 1998 WL 1547858 (1998); Brendan Stephens, *Lawyer Wins \$1.4 Million Jury Award in Suit Claiming Sexual Harassment*, CHI. DAILY LAW BULL., Sept. 29, 1998, at 1.

16. Stephens, *supra* note 15.

17. *Id.*

18. Rochester’s “victory” in her sexual harassment case resulted in the dissolution and bankruptcy of her former firm. Rochester’s efforts to collect her judgment from the bankruptcy estate are discussed, *infra* notes 67–81 and accompanying text.

19. The case is *In re Gerald Lee Fishman* (No. 01CH0109), which is still pending as of April 2003.

As of April 2003, no disciplinary actions have been taken against any of the other firm principals.

Rochester's case is an example of the full lifecycle of sexual harassment litigation, from her attempts to work out an in-house remedy to her attempts to collect her judgment from the now-bankrupt defendant law firm. A complete discussion of her case, inclusive of the parties, actors, events, and chronology, will comprise Part I of this Note. Rochester's story is especially remarkable because, viewed from the narrow lens of substantive sexual harassment law, it has all the trappings of a victory and a just result. Viewed from the wide-angle lens that includes the procedural obstacles and indignities she faced, and the enormous personal and professional toll she suffered, the case has none of the trappings of a victory, even a Pyrrhic one. It represents a stark contrast to legal scholarship that examines sexual harassment solely from the perspective of statutes, case law, and commentary. The harsh realities in Rochester's case provide a meaningful and important supplement to the discussion of the substantive law of Title VII.

Part II of this Note examines the extent to which sexual harassment continues to exist in the legal profession and the consequences of its resilience. This section addresses the gap between the formal prohibitions against harassment and the continuing actual practice of it. Two root causes are postulated for the lack of amelioration. The first is the perception that female attorneys are averse to seeking remedies to their own harassment through litigation because of the internal conflicts they experience. The second is that law firms can avoid the consequences of sexual harassment because procedural maneuvers are available to obstruct the substantive remedies of Title VII. Taken together, these two components define the Rochester example as an archetype.

Part III of this Note examines the first root cause of ongoing harassment—the internal conflict experienced by female attorneys. It looks at the prospect of sexual harassment litigation from the plaintiffs' perspective, defines what makes pursuit of claims different for them, and describes why litigation is a self-defeating proposition when viewed prospectively. Examination of the concept of the feminist "ethic of care" is relevant here, as it relates the frame of mind of being an attorney to the experience of being a woman. The ethic of care, as epitomized in legal scholarship by the character of Portia in Shakespeare's *The Merchant of Venice*, has great relevance

to the internal turmoil faced at the outset by female victims of harassment.²⁰ Under this examination, RoxAnne Rochester emerges as a modern-day Portia, and as a result her experience can be viewed as typical rather than aberrant.

Part IV of this Note examines the second root cause of ongoing harassment: the labyrinth of administrative rules, statutes of limitations, rules of evidence and civil procedure, and alternative jurisdictions such as the bankruptcy and appellate courts that comprise sexual harassment litigation and enforcement of judgments. Systemic problems within the procedures of litigation are examined and potential solutions are described. Part IV begins by describing what occurs once potential in-house remedies are exhausted—the filing of a complaint with the Equal Employment Opportunity Commission (“EEOC”). It defines why the necessity of filing with the EEOC can create statute of limitation problems for individual tort claims, especially when time has elapsed in the pursuit of an in-house remedy. The section then addresses the topic of settlement, with a special emphasis on the insistence of confidentiality clauses by defendants. The thesis here is that the defendant’s ability to buy silence for a price is but another means of maintaining the status quo of male domination and is counterproductive to remedying sexual harassment. The next foci are on discovery, the rules of evidence, and the admissibility of certain evidence at trial. The emphasis here is on the lack of evidentiary protections available to sexual harassment plaintiffs, even when the harassing conduct took the form of sexual assault. Examples of this include the invasive psychiatric evaluation of the plaintiff by the defendant’s expert and the admissibility of evidence of parental abuse, eating disorders, and marital violence, even if these events occurred years before the harassing conduct took place.

The emphasis of Part IV then turns to what occurs after the parties’ attorneys have delivered their closing arguments and the jury returns a verdict in favor of the plaintiff. This is the point at which most legal scholars depart, as the verdict is the rendering of the substantive law. However, this point marks the beginning of the wide divergence between the substantive law and the actual result. This divergence occurs because successful plaintiffs can experience significant difficulty in collecting their judgments, particularly if their former firm has filed for bankruptcy protection (true for small firms)

20. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985).

or taken an appeal (true for larger firms). The process has at this point come full circle, as any rights asserted through a “victory” in the underlying litigation are decimated by the fact that bankruptcy alters legal relationships and appeals can potentially exhaust the damages won at the trial level.

The clear conclusion from this section is that the rules and procedures that provide the structure for sexual harassment litigation do not provide a level playing field for plaintiffs, and may indeed contribute to the perpetuation of sex discrimination.²¹ The legal system is not the solution for sexual harassment; it is part of the problem. The end of Part IV discusses what differentiates sexual harassment claims from other types of litigation.

This Note concludes by addressing the antithetical relationship between the ethic of care approach and the procedural inequities of Title VII litigation. In this dichotomy, the procedures available to defendants in sexual harassment litigation enervate, to the point of death, Title VII’s commitment to resolve claims using less confrontational approaches. It is a case of “death by a thousand cuts,” which is far subtler than overt discrimination. Treating the symptoms—the procedural flaws—is suggested as a cure for the problem—circumvention of the consequences.

I. THE TITLE VII NIGHTMARE OF ROXANNE ROCHESTER

In 1989, RoxAnne Rochester was a promising young graduate of the Law School of Loyola University of Chicago. During her three years in law school, Rochester had clerked for the Chief Judge of the Chancery Division of Cook County, the Honorable Richard Curry,²² and served in an internship with the United States Attorney’s office. Rochester received several job offers and opted to accept employment with Fishman & Merrick (“F&M”), a small boutique securities and commodities firm based in Chicago. Rochester accepted the

21. The distinction between sexual harassment and sex discrimination may not seem clear. Generally, sexual harassment is looked upon as a form, or subset, of sex discrimination. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). It is, as one court described, an “arbitrary barrier to sexual equality.” *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982). Hence the assertion that inequities in sexual harassment litigation exacerbate the problem of sex discrimination and not just sexual harassment—sexual equality is compromised, not just sexual “behavior.”

22. *Rochester v. Fishman* (No. 95-CV-3896) (1998), Transcript of Proceedings before the Honorable Joan B. Gottschall and a Jury at 310–11, [hereinafter Transcript]. Judge Curry’s clerks typically went on to achieve great things in the law. One eventually became the Chief Judge of the Law Division of Cook County; another became a senior partner in a major Chicago-based law firm. *Id.* at 315–16.

F&M offer because she wanted to learn both the transactional and litigation aspects of the securities and commodities business, and she believed that working for a small firm would give her earlier opportunities for client contact and trial experience than those she might receive at a larger firm.²³

In her first year at Fishman & Merrick, Rochester worked the long hours expected of most new associates. She made an obviously favorable impression on the senior partners of the firm, as evidenced in her first performance evaluation, which she received in the fall of 1990. One of the questions in the evaluation asked the partners to assess Rochester's potential for eventual partnership. The senior partners agreed that her prospects were excellent.²⁴

Rochester's nightmare began in November 1990. In that month, as alleged in her complaint²⁵ and stated in her trial testimony,²⁶ the president of the firm, Gerald Fishman, cornered her in a hallway and kissed her unexpectedly. A few weeks later, he reached into Rochester's blouse from behind and groped her breast.²⁷ These were the first of several progressively worse incidents by Fishman that did not end until July 1991. As alleged by Rochester, these incidents included an episode in which Fishman masturbated in front of Rochester;²⁸ an act of nonconsensual, forced fellatio;²⁹ and a battery on July 5, 1991, in which Fishman forced Rochester onto a couch in his office, put his hand into her pants, and inserted his finger into her vagina.³⁰ After the hallway and blouse incidents, Rochester attempted to deal with Fishman through private and direct conversations. With the exception of Fishman's assaults, Rochester enjoyed the work she was doing at F&M and did not want to leave her job. Additionally, Fishman was married; Rochester did not want to cause problems in her boss's personal life.³¹ Significantly, F&M did not have any type of formal policy related to sexual harassment, an especial irony because the

23. *Id.* at 424-27.

24. *See, e.g., id.* at 1346. In this exchange, Rochester's attorney questioned Steven Merrick, one of the named partners of Fishman & Merrick, about a 1990 performance evaluation Merrick had written about Rochester: "Q. And the next question, 'What is the likelihood of this associate becoming a partner,' you wrote 'high'? A. I did."

25. *Rochester* (No. 1), Complaint at 7-11.

26. Transcript, *supra* note 22, at 434-35.

27. *Id.* at 449.

28. *Id.* at 440-42.

29. *Id.* at 476.

30. *Rochester* (No. 1), Complaint at 13-16; Transcript, *supra* note 22, at 485.

31. Transcript, *supra* note 22, at 457-58.

firm counseled at least two of its clients on the subject.³² This left Rochester without any guidance on how to navigate through this difficult situation other than one-on-one confrontations with her harasser.

Before the end of 1990, in the absence of a formal harassment policy and with Fishman's assaults escalating instead of ceasing, Rochester went to her assigned mentor, a principal in the firm, to ask his advice. At this time, Rochester asked her mentor not to tell any of the other principals at the firm of Fishman's behavior.³³ Rochester's concern was that the speculations and musings resulting from such a disclosure would negatively affect her standing in the firm. Her mentor advised her that someone should talk to Fishman and inform him that his conduct was inappropriate.³⁴ Rochester followed this advice by talking to Fishman herself and the assaults became less frequent. However, after the battery of July 5, 1991, Rochester once more sought the advice of her mentor. He again advised Rochester to speak directly with Fishman and stress the unacceptability of his conduct. Her mentor also suggested that Rochester make a written memorandum of her admonition to Fishman, keep a copy of the memo for herself, and provide the mentor with a third copy.³⁵ Days later, Rochester's mentor resigned from the firm.³⁶

At this point, Rochester felt compelled to go to two senior principals in the firm to seek an in-house remedy. Rochester requested both that the firm adopt a formal sexual harassment policy, and that a third party be present during any interactions she had with Fishman. She knew that doing so would place her standing in the firm at risk, but she believed the severity of Fishman's conduct warranted such action. At this time in late 1991, the country and the legal profession were in a recession, which made Rochester's decision all the more difficult. The two senior principals took Rochester's requests under advisement.³⁷ Unbeknownst to Rochester, at least one of the two principals had been fully aware of Rochester's allegations of Fishman's harassment, even before the July 5, 1991 battery.³⁸

32. *Id.* at 1200-05.

33. *Id.* at 89-94.

34. *Id.* at 93.

35. *Id.* at 94-98.

36. *Id.* at 98. No testimony was given at trial to suggest that Rochester's harassment and her mentor's departure were related.

37. *Id.* at 504-06.

38. *Id.* at 211.

With Rochester having reported Fishman's conduct to principals in the firm, Fishman did not make additional sexual assaults on Rochester after the July 5, 1991 incident. Although Rochester continued to insist on a formal harassment policy, the firm's ongoing response was that they would look into it and explore other remedies.³⁹ At Rochester's next performance evaluation in the winter of 1992, the assessment of her chance for eventual partnership had changed from "excellent" to "too soon to judge."⁴⁰ Eventually, the partners refused Rochester's request for a formal harassment policy⁴¹ and threatened to fire her if she reported the action to authorities such as the EEOC or the Illinois Human Rights Commission.⁴² With Fishman keeping his distance, and in the midst of a recession, Rochester continued her employment with F&M. She worked in an environment of increasing hostility in which the firm cut her off from assignments and firm resources.⁴³ In January 1994, a senior principal informed Rochester that the firm would provide no in-house remedy.⁴⁴ Soon after this news, Rochester filed a concurrent claim with the Illinois Human Rights Commission and the EEOC.⁴⁵ Her employment with F&M was terminated the day after the principals learned of the filing.⁴⁶

With no other job prospects and fearful of working for a stranger, Rochester opened her own firm. She had no clients and no book of business.⁴⁷ She also began receiving psychotherapy at this time and was diagnosed with post-traumatic stress disorder.⁴⁸ It is not clear whether the Illinois Human Rights Commission or the EEOC investigated her claim beyond the intake interview.⁴⁹ Rochester

39. *Id.* at 927-28. As stated in the trial testimony of one of F&M's principals, the firm did not want to "take sides" by instituting a formal harassment policy, and instead tried to implement "its own policy." *Id.* at 928.

40. *Id.* at 1077. During that year, Rochester billed the most hours in the firm by a significant margin.

41. *Id.* at 519.

42. *Id.* at 521.

43. *Id.* at 509-12.

44. *Id.* at 521.

45. *Id.* at 521; *Rochester* (No. 1), Complaint at 2.

46. Transcript, *supra* note 22, at 522-28. Whether the firm formally fired Rochester at this time is unclear. The jury eventually found that she was constructively discharged.

47. *Id.* at 531-32.

48. *Id.* at 618.

49. *Rochester* (No. 1), Complaint at 14, Ex. 1. In its "Notice of Right to Sue" letter, the EEOC stated that Rochester could proceed with her case in federal court because "[m]ore than 180 days have expired since the filing of [the Fishman] charge," and that "[w]ith the issuance of this [right to sue letter], the Commission is terminating its process with respect to this charge."

waited the statutory 180 days for her right-to-sue letter from the EEOC, during which time she could take no further action. Upon receipt of the letter and prior to filing, Rochester's attorney sent a draft of her complaint to F&M for the purpose of creating leverage in settlement discussions. The defendants moved to enjoin Rochester from filing the complaint as a public document and obtained a temporary restraining order ("TRO"); the court subsequently dissolved the TRO.⁵⁰ Rochester filed her complaint in July 1995 in the Federal District Court of the Northern District of Illinois, seeking relief under Title VII against the firm, as well as state tort claims of intentional infliction of emotional distress and tortious interference with an economic opportunity against Gerald Fishman as an individual defendant.⁵¹ She did not file a claim for battery because the statute of limitations in Illinois barred it.⁵²

Fishman & Merrick eventually selected a large and prestigious Chicago law firm to defend both F&M and Fishman individually. The defendant's counsel did not file a response to Rochester's complaint for almost nineteen months, well beyond the twenty days granted most defendants.⁵³ In sworn affidavits signed by Fishman, F&M claimed that Rochester's allegations were false and were made for the sole purpose of extorting a settlement from the firm.⁵⁴ At the time this affidavit was filed, Fishman was aware that Rochester had just rejected a settlement offer of \$200,000 to withdraw her complaint. Rochester rejected the offer because it included a confidentiality clause, a condition to which Rochester would not consent.⁵⁵

50. *Rochester*, Motion for Temporary Restraining Order.

51. *Rochester* (No. 1), Complaint at 26.

52. Under Illinois law, a plaintiff must file a claim for battery within two years of the last occurrence. 735 ILL. COMP. STAT. 5/13-202 (2003). Because Rochester did not file her claim until February 1994, seven months after the two-year statute had run for the July 5, 1991 incident, Illinois law barred her from pursuing a claim for battery.

53. The Federal Rules of Civil Procedure state that "a defendant shall serve an answer within 20 days after being served with the summons and complaint," unless a different response time is prescribed by statute or if service of the summons has been timely waived. FED. R. CIV. P. 12(a)(1)(A). According to the *Rochester* docket, 95-CV-3896, the plaintiff filed the Complaint (No. 1) on July 5, 1995, and the defendants filed their Answer (No. 76) on February 18, 1997. In the interim period, defendants filed a Motion To Dismiss Complaint (No. 23) on June 7, 1996; the judge granted the motion in part and denied it in part (Minute Order, No. 75) on January 1, 1997.

54. *Rochester*, Affidavit attached to Motion for Temporary Restraining Order.

55. In a letter to one of her early attorneys in the case, Rochester stated:

As I have indicated several times before, I am not willing to consent to any 'confidentiality' clauses, except to the extent I won't reveal the actual dollar amount paid in settlement. Thus, if Fishman & Merrick believe they are buying silence, I believe this should be clarified as soon as possible.

Rochester, in the meantime, had difficulty finding an attorney with Title VII expertise that was willing to take her case with limited settlement authority. Rochester was adamant that any settlement agreement must not include a confidentiality clause; this point was nonnegotiable. At one point, Rochester had provided her attorney with limited settlement authority and the parties agreed to a settlement amount. However, F&M continued to insist on inclusion of a confidentiality clause, which Rochester rejected. Because the parties had agreed to an amount, F&M claimed that the matter was settled and litigated the issue in a supplemental proceeding. Rochester was forced to spend \$30,000 to defend against F&M's claim that the matter was settled, and ultimately prevailed.⁵⁶

Rochester eventually found an attorney who would represent her from discovery through trial without insisting on settlement authority. During discovery, the court granted defendants' motion to subject Rochester to a psychiatric examination by defendants' expert (as opposed to an independent psychotherapist).⁵⁷ The court also granted summary judgment dismissing Rochester's tort claim of intentional infliction of emotional distress against Fishman, holding it was barred by the statute of limitations.⁵⁸ Two weeks before trial, Rochester's attorney informed her that under Title VII, she could be subject to paying defendants' costs (including experts) if she did not prevail.⁵⁹

Finally, in September 1998, four years after filing the complaint and seven years after Fishman's last assault, Rochester's case went to trial.⁶⁰ By this time, Rochester had paid more than \$110,000 in legal fees and costs out-of-pocket.⁶¹ The lead counsel for the defendants, ironically, was Rochester's boss from her law school internship with the U.S. Attorney's office.⁶² In his opening statement, lead counsel

Rochester (No. 70), Reply of Rochester to Tobin/Petkus Response Concerning Her Motion For Summary Adjudication of the Validity of Their Attorneys' Lien, Ex. B. This letter became discoverable because this particular attorney was attempting to impose a lien on the case, which he claimed had settled. See *infra* note 56.

56. *Rochester v. Fishman*, No. 95-C-3896, 1997 WL 24720 at *8 (N.D. Ill. Jan. 17, 1997).

57. *Rochester* (No. 143), Minute Order. Rochester's treating psychologist was, however, allowed to be present.

58. *Rochester* (No. 177), Minute Order Granting Summary Judgment.

59. 42 U.S.C. § 2000e-5(k) (2003).

60. Volume 1 of the trial transcript is dated September 10, 1998. Transcript, *supra* note 22.

61. This was confirmed by the attorneys' fees petitions submitted after the verdict was rendered.

62. *Id.* at 363-64.

for the defendants claimed that Rochester had brought suit for one reason—money.⁶³ During her three-week trial, the defendants were allowed to introduce unsubstantiated evidence of parental abuse and alcoholism in Rochester's family, a bout with anorexia that had occurred almost twenty years earlier, and court records that detailed spousal violence by Rochester's ex-husband.⁶⁴ Despite the odds against her, Rochester prevailed. The jury awarded her \$689,000 from F&M, plus attorneys' fees, for the Title VII violations and \$750,000 from Fishman individually.⁶⁵ A little more than three months later, the federal judge entered a judgment that remitted the firm's damages down to \$269,000.⁶⁶

In November 1998, before the entry of judgment, F&M disbanded, having paid Rochester nothing.⁶⁷ At this point, the firm had a significant outstanding balance with its defense counsel. Having decided to disband after the verdict, the firm gave its defense counsel a security interest on all its receivables.⁶⁸ The defense firm perfected the lien, which forced Rochester to place the firm in involuntary bankruptcy under Chapter 7.⁶⁹ The involuntary bankruptcy was necessary because defense counsel's lien would have enjoyed senior status to Rochester's claim without it. To protect her interests,

63. *Id.* at 39.

64. *Id.* at 1487–88, 1713–14.

65. Stephens, *supra* note 15.

66. For companies the size of F&M, Title VII limits the amount of recoverable punitive damages to \$50,000. Additionally, Title VII limits compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" to \$50,000 for employers with between fourteen and 101 employees. 42 U.S.C. § 1981a(b)(3) (1994). The court determined that many of the damages attributable to Fishman could not be assigned to the firm, which resulted in the reduction of F&M's liability. This was the judgment amount exclusive of attorneys' fees.

67. *In Re Fishman & Merrick* (No. 24, 99-04357), Motion of Alleged Debtor: (i) To Dismiss Involuntary Petition; (ii) To Bar Other Creditors From Joining In The Petition; And (iii) For Entry of Judgment Against Petitioner. On page two of this motion, F&M asserts that it ceased operations on November 30, 1998. Rochester's claim for the full value of her judgment (excluding attorneys' fees) against F&M, \$269,000, is listed on the Involuntary Petition.

68. *In Re Fishman & Merrick* (No. 120), Schedule D. Schedule D in a bankruptcy filing lists secured claims. According to F&M's bankruptcy schedules, the outstanding balance to the firm's defense counsel, Jenner & Block, was \$457,100.83 and was secured by a Security Agreement dated November 13, 1998. F&M listed this amount as "disputed" in the schedule.

69. Section 547 of the bankruptcy code allows the trustee to avoid, within certain limitations, "any transfer of an interest of the debtor in property" that occurred within ninety days of the date of the bankruptcy filing. 11 U.S.C. § 547 (b)(4)(A) (2003). Had Rochester not placed the firm in involuntary bankruptcy within ninety days of the date of Jenner & Block's security agreement of November 13, 1998, *see supra* note 68, then the trustee could not have avoided granting secured status to Jenner & Block's claim.

Rochester was forced to hire bankruptcy counsel.⁷⁰ In the meantime, all but three of the former principals of F&M had set up new firms that were closely aligned and shared adjacent office space.

That same month, Fishman joined another law firm as a partner. In May 1999, Fishman filed for personal bankruptcy protection under Chapter 11. Rochester had recorded a judgment lien on Fishman's home after entry of her judgment; by filing Chapter 11, Fishman was able to avoid Rochester's lien. This forced Rochester to hire a second bankruptcy attorney at \$225 per hour. Through most of 1999, Fishman's bankruptcy attorneys made settlement offers to Rochester that were consistently less than one-third the amount of her award. Finally, in February 2000, Fishman and Rochester settled for an amount just under 50 percent of her \$750,000 award.⁷¹

F&M's bankruptcy has been a different story. After initially contesting the involuntary bankruptcy under Chapter 7, the defunct firm consented to an order of relief in July 1999.⁷² The interim trustee, who was from the bankruptcy practice of a large local firm, immediately appointed his own firm as trustee's counsel at \$300 per hour.⁷³ Between May 1999 and June 2000, the trustee did not convene a section 341 First Meeting of Creditors.⁷⁴ During this fourteen-month period, the interim trustee collected slightly less than \$10,000 of more than \$600,000 in unliquidated accounts receivable. The interim trustee engaged in settlement discussions with defense counsel regarding adjudication of its lien and did not file an action to avoid it. Eventually, the interim trustee appointed Rochester to do the collection work at no charge to the estate.⁷⁵ Once the first meeting of creditors took place in July 2000, Rochester, as the primary unsecured creditor, elected a new trustee. This trustee took nearly the full year provided by statute⁷⁶ to file avoidance actions against F&M's defense counsel's lien. He finally did so in July 2001.⁷⁷

70. In *Re Fishman & Merrick* (No. 32), Appearance. Rochester hired Ariel Weisberg to replace Richard Fimhoff, who had actually filed the involuntary petition. In *Re Fishman & Merrick* (No. 1), Involuntary Petition. Fimhoff withdrew shortly thereafter. In *Re Fishman & Merrick* (No. 96), Motion to Withdraw.

71. In *Re Fishman & Merrick* (No. 203), Order Approving Compromise of a Controversy.

72. In *Re Fishman & Merrick* (No. 53), Order For Relief.

73. In *Re Fishman & Merrick* (No. 54), Appointment of Gus Paloian.

74. The bankruptcy code states that the first meeting of creditors must occur "within a reasonable time." 11 U.S.C. § 341(a) (2003).

75. In *Re Fishman & Merrick* (No. 106), Order Authorizing Appointment of RoxAnne Rochester.

76. 11 U.S.C. § 546(a)(1)(B) (2003).

77. *Fishman & Merrick v. Jenner & Block*, (No. 1, 01-00683), Adversary Complaint.

Between the time of her appointment by the interim trustee and June 2001, Rochester collected more than \$450,000 for the estate and was not compensated for her efforts.⁷⁸ Around the time of filing the avoidance action, defense counsel and the trustee settled the firm's claim for legal fees. Defense counsel agreed to take a lesser amount than its outstanding balance on an unsecured basis.⁷⁹ Even though the major impediment to disposition of the estate, defense counsel's lien, was settled in June 2001, the trustee did not make even interim disbursements from the estate until December 2002. At that time, Rochester received her first payments—\$171,020 and \$2,781—from the Fishman & Merrick estate.⁸⁰ She has yet to recover the vast remainder of her judgment against the former firm and has little hope of doing so.⁸¹

In summary: April 2003 is nearly thirteen years after Fishman's assaults commenced, nine years after Rochester filed her complaint, four and one-half years after Rochester's verdict, and almost four years since the order of relief was granted for F&M's involuntary bankruptcy. Thirteen years and almost \$200,000 in legal fees later, RoxAnne Rochester has received only a portion of the legal remedy under Title VII that she fought so hard to achieve.

The Rochester saga, though horrific, is illustrative of the difference between theoretical discussions of substantive Title VII law and the unfortunate realities of sexual harassment litigation and enforcement of judgments. Put another way, one who examined only the

78. Rochester's lack of compensation is discussed *supra* note 75. The \$450,000 figure is based upon prorating the total amount collected for the estate as of November 15, 2002. This amount was just over \$660,000. About one-quarter of this was collected by the first trustee and three-quarters was collected by Rochester working as special collection attorney for the second trustee. The allocation between what was collected by each trustee is based upon their relative fee awards: \$9,823 to the first trustee and \$26,986 to the second trustee. In *Re Fishman & Merrick* (No. 242), Application of Lawrence Fisher, Trustee for Allowance of Compensation.

79. In *Re Fishman & Merrick* (No. 199), Order Authorizing Trustee To Compromise.

80. The bankruptcy docket does not contain either an accounting by the trustee or a record of disbursements. However, in my communications with Ms. Rochester, I received a copy of two checks prepared by the estate and payable to her. The first was in the amount of \$171,020.52 and was dated December 12, 2002. The second was in the amount of \$2,781.03 and was dated December 19, 2002.

81. The estate was valued at \$660,000 as of November 15, 2002. See *supra*, note 78. However, payments to trustees, trustees' attorneys, and other professionals are deemed "administrative expenses" and take first priority in bankruptcy disbursements after secured creditors are paid. 11 U.S.C. § 507(a) (1993). The final amount of these expenses for the F&M estate are undetermined, but to date exceed \$200,000. Rochester, as holder of approximately 60% of the unsecured claims, will at best receive a total of \$276,000 if the amount available to creditors after payment of administrative expenses is \$460,000. This is approximately equal to her judgment against F&M but does not compensate her for the \$200,000 she paid in attorneys' fees.

verdict or read news of the trial in the *Chicago Daily Law Bulletin* might erroneously conclude that Title VII is working, and that progress against sexual harassment has been made. But one cannot walk away from the full account of Rochester's experience and make a similar claim, despite the ruling in the courtroom. One might conclude that Rochester was harassed twice, once by the partners of Fishman & Merrick, and again by the American legal system, despite the substantive law. This dichotomy, between the current state of the substantive law and the actual results of applying that law, provides guidance as to why sexual harassment continues to pervade the legal profession today.

II. THE CONTINUING PERVASIVENESS OF SEXUAL HARASSMENT IN THE LEGAL PROFESSION

The phenomenon of pervasive sexual harassment in law firms is neither new nor insignificant. In 2000, the ABA Commission on Women reported that between 50 and 66 percent of female attorneys had experienced sexual harassment in the workplace.⁸² Almost three-quarters of female attorneys believed sexual harassment was a problem in their workplaces.⁸³ These statistics were comparable to those reported by the Commission five years earlier.⁸⁴ This lack of progress was true even though almost all law firms had established formal sexual harassment policies by 2000.⁸⁵

Sexual harassment in law firms persisted in the 1990s despite a number of well-publicized cases and awards. Perhaps the most notorious of these was *Weeks v. Baker & McKenzie*,⁸⁶ in which a California jury in 1998 awarded legal secretary Rena Weeks \$6.9 million in punitive damages from Baker & McKenzie. That same year, the *Rochester* verdict was reported in the *Chicago Daily Law Bulletin*.⁸⁷ These two cases illustrate that financial consequences of

82. A.B.A. COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 19 (2000) [hereinafter A.B.A. COMM'N ON WOMEN, UNFINISHED AGENDA].

83. *Id.*

84. A.B.A. COMM'N ON WOMEN, UNFINISHED BUSINESS, *supra* note 12, at 18–19.

85. See A.B.A. COMM'N ON WOMEN, UNFINISHED AGENDA, *supra* note 82, at 19. One significant development during this five-year period was the Supreme Court's holding in *Ellerth*, which provided employers with an affirmative defense to sexual harassment claims if (a) a formal policy existed for reporting, investigating, and remedying sexual harassment, and (b) the employee failed to follow that policy.

86. *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998).

87. See *Stephens*, *supra* note 15.

sexual harassment can be significant, not only in potential damages, but also in litigation costs and the foregone billing that results from having a firm's attorneys (frequently partners or principals) as parties to a case.⁸⁸ Despite the threat of such consequences, however, the incidence of sexual harassment remains high, or in the words of the Commission, "the gap between formal prohibitions and actual practices remains substantial."⁸⁹

Perhaps this gap would not be so odious were it not for the extremely adverse consequences to women in the legal profession. In a 1998 study that relied on statistical measures, overall job satisfaction for female lawyers who witnessed or experienced sexual harassment was significantly lower than for those who did not experience such harassment.⁹⁰ More than 65 percent of female attorneys stated they were "very dissatisfied" with their jobs when they witnessed or experienced sexual harassment by a superior, and almost 60 percent gave the same answer when a peer or colleague was the perpetrator.⁹¹

In the same study, female lawyers demonstrated a "clear propensity" to leave their current employer after witnessing or experiencing sexual harassment.⁹² Female attorneys who witnessed or experienced sexual harassment from a superior were 27 percent more likely to express an intention to quit their current employment within two years;⁹³ when a colleague was the source of the harassment, female attorneys were almost 28 percent more likely to express the same "quit intention."⁹⁴ One cannot know for certain what percentage of female attorneys actually change employers because of sexual harassment, but it is likely to be a combination of those that leave as a direct result of it and others who leave because of low job satisfaction in which sexual harassment plays a role.⁹⁵

Comparable statistics do not exist that document how many women leave the profession entirely after experiencing sexual harassment. However, as the authors of the study state,

88. Neither the case law nor press accounts of sexual harassment trials reveal how much was collected by "successful" plaintiffs. The *Rochester* case is an example on point.

89. A.B.A. COMM'N ON WOMEN, UNFINISHED AGENDA, *supra* note 82, at 19.

90. David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594, 599 (1998).

91. *Id.* at 602.

92. *Id.* at 604.

93. *Id.* at 605.

94. *Id.*

95. *Id.* at 606.

[o]ur findings raise a disturbing possibility. Sexual harassment in the workplace is a matter of degree. Employers or coworkers may be able to sexually harass female employees in manners or degrees that are not sanctionable and yet so distress the targeted individuals that they quit.⁹⁶

This disparity suggests that victims of sexual harassment and perpetrators of it view its severity differently. What may be impetus for a career change for female attorneys could be viewed as normal behavior for harassers.

Surprisingly, the number of sexual harassment claims that are reported and litigated remains low. Fewer than 10 percent of women who experience sexual harassment make a formal complaint.⁹⁷ An almost negligible percentage of that group actually becomes plaintiffs in litigation.⁹⁸ This is true despite the fact that sexual harassment plaintiffs prevail in almost 60 percent of cases that go to trial when physical contact is involved.⁹⁹ This suggests that only the most egregious claims are litigated, and that the facts involved in these claims are strong enough to prevail in the vast majority of cases.

What accounts for the low percentage of formal complaints that are made, and the even lower percentage of claims that result in litigation? Beginning with the premise that most occurrences of sexual harassment are actionable, the conclusion must be that the act of filing a formal complaint and commencing litigation is viewed by victims as a last resort, one to be pursued only after attempts to procure an in-house remedy have been exhausted. As the Rochester example suggests, the initial preference of victims of harassment, even in its most severe varieties, is to work out the problem privately. This approach seeks to protect the interests and privacy of all parties involved, including the victim, the perpetrator(s) of the harassment, and the firm. However, it is this reluctance to litigate, whether real or perceived, that continues to fuel the problem. If women cannot obtain an in-house remedy for sexual harassment, then they are forced into either litigation or abandonment of their claims.

Given the likelihood of a favorable verdict for the plaintiff, and the severity of the financial consequences for defendants, why does

96. *Id.*

97. A.B.A. COMM'N ON WOMEN, UNFINISHED AGENDA, *supra* note 82, at 19.

98. *Id.*

99. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 567 (2001) (the "win rate" at the trial court level is 59.5% when physical harassment of a sexual nature, e.g., "squeezing, pinching, grabbing," occurs).

the ongoing gap between “formal prohibitions” and “actual practices” continue to exist? One possible explanation is that the actual consequences of harassing behavior are not congruent to the theoretical consequences. As the *Rochester* case illustrates, the jury’s verdict and award, which speak very loudly to a “formal prohibition,” do not in any way coincide with the financial consequences suffered by the defendants. The formal prohibition in this case is a paper tiger when “successful” plaintiffs like Rochester continue to be mired in expensive litigation, bankruptcy court, or appeals years after the jury has spoken.

Sexual harassment continues to be a significant problem. The fact that its incidence remains high despite the ubiquity of formal policies suggests that unaddressed root causes are at play. These root causes appear to be inherent in both the prelitigation (in-house remedy) phase and the litigation itself. One root cause is experiential and is based on how women confront such problems. The other is systemic and is based on how the law adjudicates them.

III. UNDERSTANDING THE PERSPECTIVE OF FEMALE ATTORNEYS WHO ARE VICTIMS OF SEXUAL HARASSMENT—THE PORTIA PARADIGM

In discussing the process faced by female attorneys in resolving sexual harassment situations, one must begin by understanding the mental perspective of the victim of harassment. Female victims of harassment in the legal profession are unique among the universe of harassed women because they must negotiate a procedural terrain that exists within the very profession in which they practice. Put another way, most victims of sexual harassment are operating outside their domains of both experience and employment when seeking to resolve their situations. Female attorneys, on the other hand, are looking to the very profession and system to which they have dedicated their professional lives to provide a remedy.

Feminist legal theory provides structures to define this experiential context, for it has “emerged from women’s experience in the legal profession and has contributed, in turn, to shaping that experience.”¹⁰⁰ Currently, four major schools of feminist legal theory exist: formal equality theory, cultural feminism or “difference theory,” radical

100. Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249, 255 (1998).

feminism or “dominance theory,” and anti-essentialist theory.¹⁰¹ Formal equality theory, the first of the major schools to emerge, stressed equality between the sexes and a system of laws—both substantive and procedural—that was gender neutral.¹⁰² Difference theory emerged as a response to formal equality theory and recognized that certain life experiences, for example, pregnancy and motherhood, were uniquely female and must be factored into discussions of equality.¹⁰³ In difference theory, true equality results not from gender-neutral application of the law, but from recognition that the law must take into account real differences between men and women. Dominance theory created an environmental context around the biological individuation of difference theory. In dominance theory, men exploit the inherent differences between men and women to maintain the status quo of existing male power structures and do so through sexual harassment, sex discrimination, domestic violence, pornography, rape, and other behaviors.¹⁰⁴ Anti-essentialist theory sought to split the atoms of both cultural and radical models of feminism by postulating that a single theory of feminism excluded other important factors such as race, ethnicity, sexual orientation, and age.¹⁰⁵ To the anti-essentialist, no monolithic theory of feminism could be accurate because gender is but one element of the many that define a woman.

None of these theories, by itself, can completely define the experiential context of female attorneys who are victims of sexual harassment. Each, however, has its application to major components of the context: the substantive law of Title VII and the rules of civil procedure that encase it, the thoughts and feelings of the harassment victim, and the employment setting of the law firm. One hypothesis that takes into account each of the major feminist legal theories appears to be the following: the laws, both substantive and proce-

101. MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 68–98, 110–35 (2001).

102. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1003–08 (1984).

103. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

104. See, e.g., Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 33–36 (1987).

105. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (asserting that traditional boundaries of race or gender discrimination do not adequately define the experiences of women of color); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (asserting that multiple perspectives should comprise the feminist movement).

dural, as they exist today for sexual harassment, follow a construct of formal equality theory.¹⁰⁶ A sole possible exception to this is the rape shield law in the Federal Rules of Evidence.¹⁰⁷ The epistemological basis of the female plaintiff is rooted in difference theory, at least to some extent. The environmental context in which the harassment occurs conforms primarily to dominance theory arguments, as the legal profession remains one of the last bastions of male power.¹⁰⁸ Elements of anti-essentialism may be relevant on a case-by-case basis; a full discussion of its applicability is beyond the scope of this Note and has been done much better elsewhere.¹⁰⁹ The essence of male-upon-female sexual harassment in the legal profession distills down to a woman who views both the situation and the potential remedy differently from the male perpetrator, her employer, and a system of laws that does not acknowledge these differences. It is difference theory on the part of the plaintiff, dominance theory on the part of the defendant, and formal equality theory on the part of the law.

Difference theory postulates that female attorneys reason “in a different voice” and is rooted in the work of social psychologist Carol Gilligan.¹¹⁰ As a result of empirical experimentation, Gilligan concluded that men and women respond to moral dilemmas in different ways: men tended to abstract moral problems and balance rights to reach their conclusions, while women focused more on the particulars of relationships and their interconnections.¹¹¹ The female approach employed an empathy in problem solving that diverged greatly from the more binary value hierarchy of men.¹¹² It focused on the substance of the problem itself and the human beings involved rather than the abstract morality of the dilemma.¹¹³ To Gilligan, the “truth”

106. In *Oncle v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80–82 (1998), the Supreme Court held that same sex harassment was actionable, but implied that it could only exist if one of two conditions were true: (a) the perpetrator was a homosexual male and his victim was heterosexual, or (b) the perpetrator exhibited an overt hostility to the male gender in general. *Oncle* also reinforced the theory that female upon male sexual harassment was actionable.

107. FED. R. EVID. 412 (making generally inadmissible evidence of other sexual behavior engaged in by the victim and evidence of the victim’s sexual predisposition).

108. See Leslie Larkin Cooney, *Lawyer, Heal Thyself: Bringing Rational Expectations to the Law Firm Environment*, 22 WHITTIER L. REV. 967, 976–78 (2001).

109. See Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183 (2001).

110. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

111. *Id.* at 25–29.

112. *Id.* at 62–63.

113. *Id.*

of a woman's experience was rooted in an ethic of care, "the tie between relationship and responsibility," and the origins of male aggression resulted from a failure of connection.¹¹⁴

Carrie Menkel-Meadow applied Gilligan's work, particularly the ethic of care, to the role of women in the legal profession.¹¹⁵ To explicate both the common elements of difference theory that female attorneys shared with other women and the masculine ethic inherent in the legal profession, Menkel-Meadow relied upon the literary paradigm of Portia from Shakespeare's *The Merchant of Venice*.¹¹⁶ To Menkel-Meadow, Portia epitomized a lawyering style that rejected the win/lose rules of engagement and sought to mediate disputes to the satisfaction of all parties.¹¹⁷ Portia's behavior comported to the spirit of Menkel-Meadow's ethic of care within the legal profession, which Menkel-Meadow defined as a

willingness to truly apprehend the reality of the other (be it client or administrative bureaucrat or opposing counsel); not just to understand instrumentally how to move, persuade or affect that person, but to understand what meaning the interaction has for that person in a caring and existential sense.¹¹⁸

In Shakespeare's play, Portia disguises herself as a male jurist to free her lover Bassanio's friend, Antonio, from his obligation to provide a "pound of flesh" to Shylock—the liquidated damages for Antonio's breach of contract.¹¹⁹ Because Antonio has clearly breached the contract, Portia seeks an equitable remedy rather than a legal one:

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blest;
It blesseth him that gives and him that takes:
'Tis mightiest in the mightiest: it becomes
The throned monarch better than his crown;
His sceptre shows the force of temporal power,
The attribute to awe and majesty,

114. *Id.* at 174.

115. Menkel-Meadow, *supra* note 20.

116. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*.

117. Menkel-Meadow, *supra* note 20, at 50–55.

118. Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 620 (1994).

119. SHAKESPEARE, *supra* note 116, act 4, sc. 1.

Wherein doth sit the dread and fear of kings;
 But mercy is above this sceptred sway;
 It is enthroned in the hearts of kings,
 It is an attribute to God himself;
 And earthly power doth then show likest God's
 When mercy seasons justice. Therefore Jew,
 Though justice be thy plea, consider this,
 That, in the course of justice, none of us
 Should see salvation: we do pray for mercy;
 And that same prayer doth teach us all to render
 The deeds of mercy. I have spoke thus much
 To mitigate the justice of thy plea;
 Which if thou follow, this strict court of Venice
 Must needs give sentence 'gainst the merchant there.¹²⁰

Shylock rejects Portia's plea to abandon his claim. "I crave the law," he says,¹²¹ in adherence to the abstract, binary morality difference theorists attribute to men. At this point, Portia abandons the ethic of care approach for a more traditional (i.e., male) approach to litigation. She points out that because Shylock's remedy would violate a Venetian statute, the contract is void. Portia does not stop there. Once the contract is voided, Portia cites another Venetian law that allows the state to confiscate Shylock's property and execute him at the discretion of the Duke. It is only the mercy of Antonio and the Duke that spares Shylock's life and property, although they force him to convert to Christianity and bequeath his property to his Christian son-in-law.¹²²

The example of Portia in the context of sexual harassment within the legal profession is helpful because it serves as an analogy to what happens when a female attorney applies an ethic of care morality to malicious and unlawful conduct.¹²³ Portia's preferred approach—to have Shylock abandon his claim because it is both the right thing to do and the solution that provides a "win/win" for all the players involved—fails. The failure of the "merciful" approach is predicated

120. *Id.*

121. *Id.*

122. *Id.*

123. Menkel-Meadow explores this in greater detail in her follow-up work. See Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

not so much upon the strength of Shylock's claim as it is upon his adherence to a position of perceived power. Said another way, Shylock believed he was the law because the contract he held bestowed that power upon him. His perspective was insular rather than contextual. It was only the hammer of litigation that forced him to relent—a hammer that escalated the legal consequences of his contract in a way that he could not circumvent.

RoxAnne Rochester is a contemporary Portia, and if one applies her actions to the paradigm, the ethic of care theory rings true. Rochester's first response to Fishman's advances was to keep his behavior secret and to discuss it only with him. At the heart of this response, and true to the ethic of care, was Rochester's initial desire to protect all relationships connected to either her, the firm, or Gerald Fishman. The relationships she sought to protect were many: her mentoring relationship with Fishman, her relationship with the other partners of the firm, the other partners' relationships with Fishman, Fishman's relationship with his family, Rochester's relationship with her job and career, Rochester's relationship with the firm's clients, and the firm's relationship with its clients. Rochester wanted a private resolution with Fishman because she valued his legal knowledge, the fact that he was responsible for hiring her, and the reality that he was her boss. The events occurred when Rochester was a second-year associate who loved her job, worked in an area of the law that fascinated her, and was at the beginning of what should have been an outstanding career. She did not want other partners in the firm to know of Fishman's behavior for several reasons. She did not want them to think of her (and their) boss in a negative light. She did not want them to view her as either a troublemaker or as "that kind of girl." She did not want others to know because Fishman had been married for many years, and his wife would be victimized by such a disclosure. Finally, such a disclosure, if made public, was likely to damage the reputation of the firm among its clients. From her perspective, Rochester's attempts to deal with Fishman privately offered the perpetrator a way out that would leave all these relationships intact.

As Fishman's harassment escalated, Rochester was forced to move away from the ethic of care in a way that established the hierarchical value of these relationships. Based upon her escalation of the problem, which followed a path of first speaking to one other person—her mentor, a principal in the firm, then speaking to the

other senior partners, and finally filing a complaint, Rochester attempted to preserve what she viewed to be the most important relationships—Rochester/clients, firm/clients, Rochester/job, and, interestingly, Fishman/family—even if it meant damaging or sacrificing Rochester/partners, partners/Fishman, and Rochester/Fishman. Like Portia, Rochester did not completely abandon the ethic of care until she was convinced beyond all hope or doubt that resolution of the problem and maintenance of the relationships could not occur simultaneously.

Rochester's example illustrates an irony in attempting to characterize her experience (and that of other female victims of sexual harassment) as occurring within an ethic of care context: it does not matter whether the theory of the ethic of care is valid.¹²⁴ The *perception* that an ethic of care exists becomes its own reality.¹²⁵ The view of most male attorneys, as reported in a recent survey, is that female attorneys have greater empathy and "people skills," but lack assertiveness and aggressiveness.¹²⁶ Further support for this perception is given by the reluctance of women to file formal complaints of sexual harassment.¹²⁷ The reality for most harassers, therefore, is that an ethic of care is shorthand for a reluctance for confrontation. This reluctance can extend even to women who may be top-notch litigators but do not or cannot apply the same adversarial zeal to their personal situations.

Perhaps the fundamental difficulty faced by Rochester and other victims of sexual harassment is that they ascribe their own ethic of care to the harasser and his law firm. From their perspective, isn't respect for relationships the way any decent, civilized person would act? And once the harasser sees the error of his ways and repents, doesn't everyone benefit? But the converse is true: rather than applying an ethic of care to such situations, harassers and their firms approach them from a vantage point of the male power structure—classic dominance theory. The victim of harassment must be "put in her place." Rainmaking partners must be protected. The reputation of the law firm must be immunized. Unfortunately, multiple opportunities exist along the entire confrontational process of sexual

124. See Ehrenreich, *supra* note 8, for references to other theoretical sources of the "ethic of care."

125. This dispenses with the need to explore critiques of Gilligan's and Menkel-Meadow's work, including that of "dominance feminism" and anti-essentialism.

126. Terry Carter, *Paths Need Paving*, A.B.A. J., Sept. 2000, at 37.

127. See A.B.A. COMM'N ON WOMEN, UNFINISHED AGENDA, *supra* note 82, at 19.

harassment litigation, from EEOC reporting through bankruptcy or appeal, to do all of the above. Because procedural law provides the means to circumvent the legal consequences of sexual harassment, law firms have no motive to approach these situations from an ethic of care perspective. This transmogrifies the possibility of Portia's equitable remedy to sexual harassment into a no-win situation for its victims.

IV. HOW THE PROCEDURES OF SEXUAL HARASSMENT LITIGATION PROVIDE THE MEANS TO DEFEAT SUBSTANTIVELY VALID CLAIMS

Law firms can defeat sexual harassment claims, either substantively or procedurally, because they have the time, resources, and money to do so. Moreover, law firms have motivation to defeat these claims to protect an entrenched male power structure.¹²⁸ The relative mismatch between the resources of the defendant and those of the plaintiff (who may be unemployed at the time litigation commences) provides further incentive to confront claims rather than seek an in-house remedy.

If the facts of the plaintiff's claim are strong, then defendants are not likely to prevail substantively at the trial level.¹²⁹ However, procedure provides defendants with the ability to frustrate the claim entirely or to settle the claim on extremely favorable terms. Procedure becomes the defendant's greatest ally in a war of attrition, for the reality of sexual harassment litigation is a long, tortured process that occurs in many venues: administrative agencies, state and federal trial courts, and supplemental courts. The process provides defendants with the means to launch "first strikes" against plaintiffs who may be mired in statutory mud, and if these fail, to exhaust sexual harassment plaintiffs emotionally and financially.

Four critical stages of sexual harassment litigation exist for plaintiffs, and the stakes associated with continued pursuit of claims increase with each one. These include (a) the filing of the claim with the EEOC,¹³⁰ and ultimately, the federal court; (b) attempts by both

128. In 2000, men comprised 70% of all lawyers, 85% of law firm partners, and 95% of law firm managing partners. *Id.* at 14.

129. See Juliano & Schwab, *supra* note 99, at 567 (the "win rate" at the trial court level is 59.5% when physical harassment of a sexual nature, e.g., "squeezing, pinching, grabbing," occurs).

130. Even if the victim has signed an employment agreement that requires her to follow a formal policy and submit to binding arbitration, the Supreme Court has recently ruled that the EEOC can still bring suit on its own behalf. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

parties to settle the claim; (c) discovery and trial once settlement discussions fail; and (d) enforcement of the judgment if the plaintiff prevails at trial. Each stage consists of rules and procedures that disadvantage the female plaintiff and, as a result, frustrate the substantive law.

A. Filing the Claim: Hurry Up and Wait, But Don't Wait Too Long

Sexual harassment claims involve two prongs. The first involves individual tort action, such as assault, battery, intentional infliction of emotional distress, invasion of privacy, false imprisonment, and tortious interference, against the harasser. The second involves a Title VII claim against the firm itself. The two claims can be included in the same lawsuit but must name different parties as defendants. This is because individuals cannot be held individually liable under Title VII,¹³¹ and tort claims must be brought against individual tortfeasors.

Attempts to remedy harassment claims in-house are problematic to bringing tort claims because intentional torts usually have a two-year statute of limitations.¹³² The statutory period begins to run from the time of the last harassing act, and is not tolled merely because the individual has first attempted to procure an in-house remedy.¹³³ If tort litigation is not commenced within two years of the most recent act of harassment (provided the court views the most recent act as part of an ongoing chain of events), then the only tort claim available is usually tortious interference, which typically has a five-year statute of limitations.¹³⁴

However, plaintiffs cannot file tort claims that are part of a Title VII lawsuit before filing a complaint with the EEOC and, if required, with the state or local civil rights commission.¹³⁵ The victim of harassment cannot file suit at all for either tort claims or Title VII violations if either the EEOC or the state or local civil rights commission decides to pursue the claim. Should both commissions decline to pursue the action, the victim of harassment must wait for a "right to

131. Every Circuit Court of Appeals has made this ruling. See, e.g., *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995).

132. See, e.g., 735 ILL. COMP. STAT. 5/13-202 (2003) (requiring that an action for damages in tort for "injury to the person" commence within two years "after the cause of action accrued").

133. See, e.g., *Juarez v. Ameritech Mobile Communications*, 957 F.2d 317, 322-23 (7th Cir. 1992).

134. See, e.g., 735 ILL. COMP. STAT. 5/13-203 (2003).

135. 29 C.F.R. § 1601.13(a)(3)-(4) (1997).

sue" letter to be issued by the EEOC. The statutory waiting period for this letter is 180 days.¹³⁶ Intentional tort claims are not tolled by this waiting period.¹³⁷

Once the right to sue is granted by the EEOC, federal court is usually the selected venue because Title VII is a federal statute.¹³⁸ The victim of harassment now becomes a plaintiff, and her firm, as well as the harasser, become defendants.¹³⁹ The plaintiff files a complaint in federal court pursuant to Rules 7 and 8 of the Federal Rules of Civil Procedure.¹⁴⁰ At this point, the sexual harassment plaintiff must abandon any pretense of the ethic of care and become a Title VII litigant. Termination of her employment at the firm, whether voluntary or involuntary, has likely either occurred or is imminent.¹⁴¹

Because resolution of the sexual harassment claim has become an adversarial proceeding, the plaintiff begins at an extreme disadvantage. On her side are the facts—and that is all. Even this attribute is a weakness because most harassment disputes are ultimately "he said/she said" cases. Opposing her is her former law firm, of which the partners, associates, and even staff have a vested interest in defeating the claim at all costs. Assisting the defendants is usually the white-collar criminal defense division of a major law firm. Plaintiff, on the other hand, is usually without the financial means to engage an attorney's services on a straight hourly rate basis. Title VII includes a provision that allows a prevailing plaintiff's attorneys to collect their

136. A circuit split currently exists as to whether the EEOC can issue a right-to-sue letter earlier than the 180 days specified by statute. *Compare* Martini Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1347–48 (D.C. Cir. 1999) (dismissing suit filed before end of 180-day period), *with* Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984) (allowing suit to proceed based on an early right-to-sue letter).

137. Although state tort claims of battery and intentional infliction of emotional distress are available against the individual harasser, this Note addresses the systemic flaws in Title VII itself and does not address potential state actions here.

138. 28 U.S.C. § 1331 (1993) provides jurisdiction, although federal claims can also be brought in state court.

139. *Ellerth* established with finality that employers could be liable for sexual harassment by the harassment victim's supervisor under a negligence theory of respondeat superior.

[A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

140. FED. R. CIV. P. 7, 8.

141. Discharging an employee as a result of filing a Title VII action constitutes constructive discharge or retaliation that is, in itself, actionable. 42 U.S.C. § 2000e-3(a) (1994).

fees from the defendants,¹⁴² but this provision, at best, results in a contingent fee arrangement that can approach 50 percent of awards. The notion of the “private attorney general” also encourages plaintiff’s attorneys to go for quick settlements, albeit at a slightly lower percentage (30 to 40 percent) of their contingency.¹⁴³ If the plaintiff refuses to give settlement authority to her attorney, or grants authority not to fall below a high ceiling, then her attorney is likely to incorporate some hourly rate provision—usually at 50 percent—in the representation agreement.¹⁴⁴ The resulting fees and costs from such an arrangement can exceed \$100,000 before the case goes to trial, even at one-half of the plaintiff’s attorney’s hourly rate.¹⁴⁵ Obviously, there is a mismatch between a plaintiff’s ability to pay such fees up front and the defendant’s ability to afford representation that costs much more.

The procedural disadvantages to the sexual harassment plaintiff at the filing stage are twofold. The first, and most significant, is that state tort claims and federal Title VII claims are treated differently under state and federal law for statute of limitation purposes, but treated the same in terms of the EEOC’s filing requirements. A

142. *Id.* § 2000e-5(k).

143. This type of “sliding scale” contingency agreement can be found in *Bradley v. Consolidated Edison Co. of N.Y.*, 1991 WL 156368 (S.D.N.Y. 1991). The representation agreement between the Title VII plaintiff and her attorney stated:

For your services as attorney, it is agreed that you shall receive twenty-five percent (25%) of any amount recovered before the complaint is filed, thirty-three and one-third percent (33 1/3 %) of any amount recovered in the event of settlement, forty percent (40%) of any amount recovered in the event of trial, and fifty percent (50%) of any amount recovered subsequent to an appeal of my case or cases.

Id. at *1.

Attorneys can also structure representation agreements to collect both attorney fee awards from defendants and a percentage of the plaintiff’s judgment. *See, e.g.,* *Gobert v. Williams*, 323 F.3d 1099, 1100 (5th Cir. 2003) (holding that attorney was entitled to both his fee award from Title VII defendants and 35% of the plaintiff’s award because representation agreement specified as much). However, courts will typically not award an attorney more than 50% of a plaintiff’s total recovery. *See, e.g.,* *Ross v. Douglas County*, 244 F.3d 620, 622–23 (5th Cir. 2001) (holding that 50% contingency in judgment was reasonable, but must be offset by court-awarded attorneys’ fees).

144. *See, e.g.,* *Williams v. Pharmacia*, 1997 WL 149301 (N.D. Ind. 1997). In *Williams*, a Title VII plaintiff agreed to pay one of her attorneys \$110 per hour plus 5% of any lump sum received from defendant if plaintiff “remained in her position.” *Id.* at *8. This agreement also contained provisions to pay the attorney “\$50 per hour and 20% of any settlement above \$50,000.00 once [defendant] offered a settlement” or “\$50 per hour and 33% of any settlement or judgment if a lawsuit was filed.” *Id.*

145. In the *Rochester* case, the plaintiff had paid her attorney more than \$100,000 out of pocket before the case went to trial. This amount was 50% of the actual fees billed by her attorney. Rochester’s attorney was to reimburse her for these fees to the extent that a fee award against the defendants equaled or exceeded her attorney’s total fees. *See supra* note 61.

sexual harassment plaintiff has up to two years after the last tortious act, whether it is battery, false imprisonment, invasion of privacy, or intentional infliction of emotional distress, to work out an in-house solution before filing state tort claims. If she spends two years pursuing an in-house solution, however, she forgoes any possibility of pursuing intentional tort claims as part of a Title VII action because of the mandatory 180-day waiting period. Should she wish to file a complaint alleging both tort claims and Title VII violations, she has a maximum window of eighteen months after the last tortious act occurs. If she does not file her complaint with the EEOC within this window, the state tort claims will be barred.

Although eighteen months may appear at first to provide adequate time to file, consider the following hypothetical: a male partner gropes a female associate on more than one occasion, and then ceases such behavior. The associate may seek an in-house remedy (if one is available), or she may not. However, over the next several months, she notices, imperceptibly at first, that the quality and number of her assignments is declining, and that other members of the firm are treating her more coldly. In her next performance evaluation, she receives feedback that her performance has declined. Eventually she reaches a point at which she concludes that she is working in an environment that is hostile to her, or that her failure to provide a quid pro quo to the partner has resulted in a career setback. This moment of clarity may not arrive sooner than eighteen months, and if it does not, the female associate has no recourse for the individual torts she suffered at the hands of the partner. As an example, Rochester did not receive her first negative performance review until more than sixteen months after Fishman's last attack.

The second procedural disadvantage at this stage is the mandatory filing and statutory waiting period of the EEOC. The charter of the EEOC, which was enacted in 1964 to achieve the objectives of Title VII, is to eradicate discriminatory practices by "conference, conciliation and persuasion."¹⁴⁶ Congress expanded this charter in the Equal Employment Opportunity Act of 1972 by authorizing the EEOC to file suit in federal court.¹⁴⁷ However, this expansion of the EEOC's charter did not come with additional staffing and resources, resulting in an agency that is seriously understaffed and under-

146. 42 U.S.C. § 2000e-5(b) (outlining enforcement provisions and responsibilities of the EEOC in handling charges of employment discrimination).

147. *Id.* § 2000e-5(f)(1).

funded.¹⁴⁸ Between 1995 and 1998, the EEOC received over 15,000 sexual harassment complaints.¹⁴⁹ The EEOC represented only a very small percentage of these complainants in litigation.¹⁵⁰

The unfortunate reality is that the mandatory filing of the Title VII complaint with the EEOC, noble though the purposes are of providing a rapid administrative remedy and avoiding gridlock in the federal court system, is ineffective. It has become, instead, a mandatory stop on the way to the courthouse.¹⁵¹ In rare instances involving high-profile cases or issues, the EEOC takes center stage. Far more often, especially when dealing with low-profile cases, the EEOC does not conduct an investigation at all.

The problems associated with a mandatory 180-day waiting period are not limited to its impact on state tort claims. A second problem is the perception that the 180-day period communicates to the plaintiff. That perception is that the entire might of the United States government is standing shoulder-to-shoulder with the plaintiff in her pursuit of a remedy and that the playing field has been evened. The reality, however, is that the defendant has just received six months to prepare a defense. During that same period, key witnesses may leave the firm, key documents may disappear, and investigations may begin into the private life of the plaintiff. Additionally, this is a period in which the plaintiff may very likely be unemployed, further adding to the economic mismatch.

The procedural realities of the filing stage contribute to sex discrimination for two reasons. First, the procedural requirement that Title VII claims filed with the EEOC incorporate state tort claims forces the plaintiff to choose between filing within eighteen months of the last harassing act or forgoing state tort claims. Inconsistency between the filing requirements and the statutes of limitations penalize women for seeking in-house remedies—exercising an ethic of care—as a result. The harasser and his firm need only “string the plaintiff along” for a matter of months to ensure a statute of limita-

148. Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV., 219, 260–61 (1995) (indicating that less than five years after the 1972 act, the EEOC had a backlog of 130,000 uninvestigated charges).

149. See Julianio & Schwab, *supra* note 99, at 551 n.6.

150. For example, the EEOC was involved in only 193 such suits in 1995 and 106 suits in 1996. *Id.* at 562 n.61.

151. See, e.g., Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 7–11 (1996) (describing the mandatory process of filing with the EEOC and that the predominant outcome is litigation in federal court).

tions bar to the tort claims. Women are denied remedies otherwise available to them for seeking, even at this point, a civilized solution.

Second, the entrustment of an administrative remedy to an understaffed federal agency becomes another hurdle for the plaintiff to overcome. One would hope that the EEOC requirements would ensure equality at the prelitigation stage between plaintiff and defendant. Instead, the reality is that it provides advantages to an already economically more powerful defendant by allowing for investigation into the plaintiff's private life and formulation of a discovery strategy. It also burdens an already economically disadvantaged plaintiff by ensuring no result or economic recovery for at least six months.

One way to remedy at least part of this problem is to amend Title VII to toll any state statutes of limitation connected to torts that occurred during the harassment period.¹⁵² The harassment period referred to here is that defined by Title VII and its supporting case law, and could extend up to the point of constructive discharge. This modification is also a means of addressing the conundrum of whether sexual harassment is a dignitary tort or discrimination by allowing, in all cases, the pursuit of the former under state law and pursuit of the latter under Title VII.

B. Buying Silence: Settlement and the Strings Attached to It.

Once the EEOC has issued a right-to-sue letter, plaintiffs have ninety days to file a suit in federal court.¹⁵³ Plaintiffs, defendants, and courts involved in sexual harassment cases have a number of incentives to settle the case before it goes to trial. First, the court itself encourages settlement.¹⁵⁴ Many times, the plaintiff wants only to "get on with her life," and looks at a long, difficult, and expensive litigation process with great trepidation. The firm, on the other hand, wants nothing more than to eliminate all traces of the action and

152. In Illinois, for example, the Code of Civil Procedures allows the tolling of statutes of limitation "[w]hen the commencement of an action is stayed by injunction, order of a court, or statutory prohibition." 735 ILL. COMP. STAT. 5/13-216 (2003). However, Title VII currently contains no language that precludes a plaintiff from filing a state cause of action for battery or intentional infliction of emotional distress outside the context of sexual harassment. The suggestion here is that the civil procedure of most states could accommodate a revision of Title VII that would mandate the tolling of state tort claims. *See, e.g.*, CAL. CIV. PROC. § 356 (2003) (stayed by court order or statutory prohibition); N.Y. C.P.L.R. 204(a) (McKinney 1990) (same).

153. 42 U.S.C. § 2000e-5(f)(1) (1994).

154. FED. R. CIV. P. 16(a)(5).

avoid an expensive legal defense.¹⁵⁵ The plaintiff's lawyer is content to receive a guaranteed minimum of \$20,000 with a ceiling of around \$100,000 for a few weeks of work, as opposed to an uncertain \$300,000 after years of discovery, motion practice, and trial preparation.

Two sticking points are usually the causes of scuttled settlement discussions. The first is the amount. Full awards under Title VII usually include back pay, front pay, emotional distress, and punitive damages.¹⁵⁶ Depending on the career level of the plaintiff, "specials" for these damages include at least a year of back pay, which alone can exceed \$100,000. After deducting her attorney's fees, such a settlement leaves the plaintiff with less than \$70,000, all of which is considered taxable income. Such an amount is also received in a context in which a female lawyer has just sued her former employer. Prospects for a new job with other firms are slim, notwithstanding the trust issue. This leaves the option of starting over as a sole practitioner with less than a year's salary to build a client base and a thriving law practice.

The other cause of failed settlement negotiations is the firm's insistence on a confidentiality clause in the release. This is anathema to the plaintiff for two reasons. The first is that inclusion of a confidentiality clause gives credence to the notion that the harassment never happened. The second reason is more practical and stems from the first. If the plaintiff agrees to a confidentiality clause, she puts herself in the position of being sued by her former employer should she discuss the events that led to her departure from the firm. In one of the great twists of irony in the sexual harassment litigation process, the victim of harassment now becomes the legitimate target of a lawsuit.

One tactic used by defendants in the strategy to financially and emotionally exhaust the plaintiff is to file supplemental proceedings to enforce settlements even when no meeting of the minds took

155. None of a law firm's typical insurance policies—D&O, professional liability, general liability umbrella coverage, and even worker's compensation—is likely to fund a defense. Each of these types of policies typically excludes defending willful and wanton acts, which usually applies to sexual harassment.

156. Title VII is explicit only about back pay and considers the other remedies listed here to be "other equitable relief." 42 U.S.C. § 2000e-5(g)(1). The availability of these types of remedies as "other equitable relief" has occurred through case law. *See, e.g., Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991) (holding that front pay is an equitable remedy under Title VII).

place.¹⁵⁷ This tactic is consistent with the defendant's strategy to win the litigation war through attrition. Because of the mismatch between the plaintiff's and the defendant's abilities to pay legal fees—the plaintiff's lawyer will usually treat such supplemental proceedings on a straight hourly rate basis even if the underlying action is arranged as a contingent fee—such a tactic can wipe out a plaintiff's litigation “war chest” before discovery even begins.

Current procedure regarding settlement is among the most notorious means of perpetuating sexual harassment. The allowance of confidentiality clauses means that silence—and thus denial—can be purchased for a price. Confidentiality ensures that neither the facts of the perpetrator's harassment, nor the ensuing discrimination by the firm, will ever be made public.¹⁵⁸ The resulting message is that the ability to harass can be purchased without consequence to either the individual's or the firm's reputations.

The remedy to this defect is simple: As a matter of public policy, change federal law to make inclusion of confidentiality clauses in Title VII settlements unlawful. Such a provision is necessary because the failure to publicly expose sexual harassment is perhaps the primary reason for its perpetuation. The incentive for firms to curtail and police sexual harassment will result only when perpetrators cannot conceal their acts, especially through buying silence. Outlawing confidentiality strikes at the root cause of the harassment problem, although it may deter settlement for cases already being litigated. Undoubtedly, plaintiff's attorneys (and possibly plaintiffs themselves) will argue that the inclusion of confidentiality improves the settlement amount, and that the inability to include such clauses would either discourage settlement by defendants or deny their clients the maximum dollar recovery available to them. Both may be true. However, exclusion of a confidentiality clause does not equate

157. See *supra* note 56 and accompanying text.

158. An excellent example of this occurred in *Isaacson v. Keck, Mahin & Cate*, No. 92-C-3105, 1993 WL 68079 (N.D. Ill. March 10, 1993), in which Erin Isaacson, who was an associate with Keck at approximately the same time Rochester was an associate with F&M, sued the firm under both Title VII and state tort claims. The case cited here was for summary judgment that dismissed some of her claims but allowed others to continue. I sent an e-mail to Ms. Isaacson to inquire whether she had endured an experience similar to Ms. Rochester. I received an e-mail response from her attorney, which stated: “As a part of the settlement of that litigation, the parties entered into a confidentiality agreement which bars any party from discussing this matter with a third party. Thus, Ms. Isaacson is not permitted to answer your questions.” A few years after the litigation, Keck was thrown into involuntary bankruptcy and is currently in the process of being liquidated. Ms. Isaacson, according to the *Martindale Lawyer Locator*, currently works as general counsel for a company in suburban Chicago.

to an admission by the firm of wrongdoing (and the settlement itself can be sealed). Additionally, if a plaintiff slanders or libels her former firm after settlement, then the law provides remedies to the firm for recovery. Finally, the complaint itself is a public document, so confidentiality clauses do not prevent the disclosure of the underlying facts of the claim. Settlement amounts may be lower in the short term, but incidents of harassment are likely to be fewer in the long term.

C. Inequities in Discovery and Admissibility of Evidence at Trial

Once initial settlement discussions fail, discovery begins. Documents are subpoenaed and depositions are taken. The plaintiff's deposition can be especially traumatic as she is forced to recount sexual assault, battery, and retaliation under civil, not criminal, standards. The higher evidentiary threshold of the rape shield law used in criminal proceedings¹⁵⁹ is not available to protect her. In fact, the defendant can move to compel the court to order a psychiatric evaluation of the plaintiff conducted by the defendant's expert.¹⁶⁰ No similar examination of the defendant is available to the plaintiff. Moreover, the notes of any psychologist or psychiatrist that has treated the plaintiff are fair game because of an exception to the hearsay rule.¹⁶¹

Contrast this with the fact that any means of present tense documentation by the plaintiff of the harassing events, such as memoranda to the file or e-mails to confidants, are inadmissible hearsay.¹⁶² Such documents are out of court statements made by a plaintiff to prove that the harassing conduct took place. Additionally, relating the specific events to a confidant for the purpose of publicizing also constitutes hearsay.¹⁶³ In a "he said/she said" context, this places the plaintiff at a significant evidentiary disadvantage.

159. FED. R. EVID. 412.

160. Under Rule 35 of the Federal Rules of Civil Procedure, the court may order a party to submit to a mental examination by a "suitably licensed or certified examiner" when the mental condition of the person is "in controversy." FED. R. CIV. P. 35. Because emotional distress is usually a component of the plaintiff's damages, the nature and extent of the distress is a question of fact.

161. FED. R. EVID. 803(4).

162. FED. R. EVID. 801, 802.

163. In rare instances, however, if a particularly traumatic incident is recounted to another soon after the incident occurred, it could qualify as an excited utterance and thus be admissible. FED. R. EVID. 803(2).

At trial, under Title VII, the plaintiff has the burden of proof against the firm under a preponderance of the evidence standard.¹⁶⁴ She must prove that it was more likely than not that the following occurred: First, the harassing conduct actually took place. Second, either the firm had no sexual harassment policy, or it did have a formal policy that the plaintiff followed.¹⁶⁵ Third, either the firm took no action to investigate the complaint, or it did conduct an investigation but provided no remedy.¹⁶⁶ Finally, the plaintiff must prove damages and that she sought to mitigate them.¹⁶⁷

The first and fourth elements are the most difficult to prove. Usually, there are no witnesses to sexual harassment, particularly when sexual assault takes place. This means that proof of the offending conduct is primarily circumstantial. Recounting of the events to others, either orally or in writing, can be testified to by the plaintiff but not by the person hearing or reading the description because of hearsay rules.¹⁶⁸ It is left to other evidence, such as phone records and inconsistent job evaluations (high marks at first, with a dramatic drop in later evaluations) to infer that the incidents occurred.

Absent these, proof that the incidents occurred comes down to a contest of credibility. Here, too, the plaintiff is usually at a disadvantage. Defendants will usually raise one of three alternate explanations. The first is that the plaintiff is an employee dissatisfied with either her case assignments or career progress who "has it in" for the firm and the offending lawyer.¹⁶⁹ The second is that the plaintiff is, at best, a marginal lawyer and is using a harassment suit as a means to extort the firm (usually as a prelude to leaving).¹⁷⁰ The third (and highest risk) alternate explanation is that the incidents occurred, but they were consensual. The liaison went bad afterwards, and the

164. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (holding that "[c]onventional rules of civil litigation generally apply in Title VII cases . . . and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence").

165. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (the EEOC regulations advise employers to "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment" (quoting 29 C.F.R. § 1604.11(f) (1997))).

166. *Id.*

167. *Id.*

168. See FED. R. EVID. 801-03.

169. For example, in the *Rochester* case, F&M stated that her lawsuit was "without merit of any sort, and intended solely as an extortion attempt to 'shake down' F&M and Fishman for a settlement." *Rochester v. Fishman* (No. 1, 95-CV-3889), Motion for Temporary Restraining Order at 3.

170. *Id.*

plaintiff is using the lawsuit for revenge. To bolster their explanation, defendants will rely on the notes of plaintiff's treating psychologist, the psychological examination conducted by their expert, and expert testimony itself to portray the plaintiff as an individual with deep emotional problems. In many cases, the plaintiff will be suffering from post-traumatic stress disorder and must rely on this, at least partially, to prove damages. This opens the door to admission of evidence of any other mental illness that occurred earlier in the plaintiff's life, such as eating disorders during the plaintiff's high school years, even if the plaintiff has made a full recovery.¹⁷¹ Evidence of violence or alcoholism on the part of the plaintiff's parents or (former) spouse is also fair game. The goal here is to paint the plaintiff as an individual with significant baggage. She is the one "causing trouble," who somehow could not find a way to work well with others.

Defendants, on the other hand, will present themselves as paragons of the legal profession. Every career distinction going back to law school, every charitable pursuit, every year of marriage will find its way to the jury during direct testimony. Female attorneys that were mentored by the defendants will almost always offer character testimony.

Damages, particularly related to back pay and front pay, are also difficult to prove because of the requirement of mitigation. Once the plaintiff has left her job, it is incumbent upon her to seek alternate employment, usually as an attorney. Leaving the profession entirely can be fatal to the contention that mitigation occurred. Defendant's counsel will confront the plaintiff with classified ads from the time of the departure, questioning why the plaintiff didn't just leave her job. The fact that the plaintiff was so traumatized by her experience that she would not feel comfortable working for another male attorney is inoculated. The front pay issue is confronted by taking the plaintiff's last job evaluation, which in almost all cases reflects a low rating, and implying that she would have earned below market salary, if she had been on a partnership track at all.

Evidentiary procedures in discovery and trial perpetuate harassment because they put the victim of harassment on trial. Her past becomes the issue, and there is no rule of evidence to prevent that. Ironically, the plaintiff does not receive the criminal standard of

171. This is generally done as impeachment during cross-examination of the plaintiff.

protection for the rape shield law even if she had been sexually assaulted. This is "civil" court, after all.

Although rewriting the Federal Rules of Evidence would be an overbroad solution to this problem, the requirement here is the education of judges. Because of the discretion judges have related to admissibility, appreciation of the irrelevance of a plaintiff's past or psychological tests is the only solution to prevent gross inequities such as those endured by Rochester. In particular, judges should apply the tort standard of "taking plaintiffs as they are" at the time of the harassing behavior, and rule that any evidence of prior mental illness is inadmissible in adjudicating the emotional distress component of the claim.

D. Obstruction of Justice: Problems Plaintiffs Face in Enforcing and Collecting Title VII Judgments

Despite the odds that the sexual harassment plaintiff has faced up to this point, she is likely to prevail once her case goes to the jury.¹⁷² This victory is short-lived, however, because there are differences between receiving a million-dollar verdict, translating the verdict into a judgment, and collecting on that judgment. Defendants are most likely to use one of two procedural ploys: bankruptcy (in the cases of small to medium-sized firms) and appeal (in the cases of medium-sized to large firms).

Bankruptcy is a viable option for smaller firms because the extent of their exposure to the plaintiff's judgment is limited to unsecured assets.¹⁷³ Moreover, the procedural window between the Title VII verdict and the filing of bankruptcy provides defendants with the ability to maneuver their assets to preferred creditors. In the weeks after the Title VII verdict, the trial judge must examine the jury's award and remit it down to avoid damages in excess of statutory maxima.¹⁷⁴ The time that elapses between the verdict and the judgment is critical because the plaintiff cannot record the judgment as a lien against the firm's assets. Before the judge converts the verdict to

172. See Juliano & Schwab, *supra* note 99, at 567.

173. The assumption here, of course, is that the law firm is organized as a limited liability corporation, limited liability partnership, or professional corporation—any type of entity that protects the firm's partners from individual liability.

174. See generally 42 U.S.C. § 1981a(b) (1994). The statute sets maxima on punitive damages and certain types of compensatory damages based upon the liable employer's number of employees.

a judgment, the defendant firm can grant a security agreement to their defense counsel and make preparations to disband.¹⁷⁵ This forces the plaintiff to make a difficult choice. She can wait to receive the judgment and record it, but this will place her in a junior position to the law firm that just finished going to war with her. If the firm disbands, its assets will be distributed to secured creditors first, in the order in which their liens were perfected, according to the state's version of the Uniform Commercial Code. This means that the banks will be paid by the firm's assets first, the firm's Title VII counsel will be paid next, and anything left over (which may amount to nothing) will go to the plaintiff.¹⁷⁶ The only way to avoid the lien of defense counsel is to place the defendant firm into involuntary Chapter 7 bankruptcy within ninety days of the perfection of defense counsel's lien.¹⁷⁷ In this situation, the trustee in bankruptcy can avoid the lien and convert the status of the defendant's legal counsel from a secured creditor to an unsecured creditor.¹⁷⁸ The downside of this, however, is that the plaintiff is now mired in bankruptcy proceedings and must stand in line with all other unsecured creditors¹⁷⁹ (although she will usually be the largest one). The clock then restarts on the years of litigation it took to achieve the jury's award, with the difference being that the bankruptcy judge is indifferent to the trauma that brought the Title VII plaintiff to his or her courtroom. The plaintiff is a judgment creditor, nothing more, and is likely to receive pennies on the dollar.

Although the estate in bankruptcy resulting from the defunct firm may have considerable assets, the bankruptcy code gives all power of disposition of the estate to the trustee and his or her designees, and none to the unsecured creditors.¹⁸⁰ Thus the Title VII plaintiff is forced to rely upon the actions of the trustee. It is up to the trustee to file an adversary proceeding against the defendant's legal counsel to avoid the lien. Federal law allows the trustee in

175. In the case of small to medium-sized law firms, partners are often so disillusioned with the behavior of the offending lawyer (particularly if he is a rainmaking partner) that they will leave the firm and reorganize elsewhere.

176. The bankruptcy code gives secured creditors a priority interest in the estate up to the amount of the security interest. 11 U.S.C. § 506 (1993). If two secured creditors have interests secured by the same collateral, then the senior creditor will take priority over the junior creditor.

177. Such a lien becomes an avoidable preference under 11 U.S.C. § 547(b).

178. This may, however, qualify as a fraudulent transfer under 11 U.S.C. § 548.

179. The priority of payments from the estate is found in 11 U.S.C. § 507.

180. 11 U.S.C. § 327.

bankruptcy up to two years to do this.¹⁸¹ Trustees may be reluctant to file legitimate avoidance actions against defense counsel for two reasons. The first reason is that the defense counsel's firm is likely to have virtually unlimited resources to contest such an action. Trustees must think hard about depleting the assets of an estate to engage in lengthy and costly litigation, no matter how frivolous the defense counsel's claim. The second reason is that most trustees deal with the bankruptcy divisions of the defendant's legal counsel on a collegial basis. Because trustees are private attorneys, the trustee may find himself or herself on the debtor or creditor side of a future case in which defense counsel is serving as trustee. Although the U.S. Trustee's office and the private trustee program are generally credible and upstanding organizations, the system creates potential conflicts of interest, or at the very least, the appearance of conflicts of interest. The *Rochester* case provides an interesting hypothetical: If the prevailing plaintiff had been the daughter of the managing partner of a large and prestigious firm, and defense counsel had been a sole practitioner who had taken a lien on the firm's assets, would the trustee have waited two years before filing an avoidance action? It is left to readers to answer this question for themselves.

The current procedures for entering and enforcing judgments in sexual harassment cases provide the defendant and the defendant's law firm with preferential positions. For example, if the firm seeks to avoid payment through bankruptcy, its two largest creditors are likely to be the defendant's defense counsel and the plaintiff. The firm wants to avoid paying the latter at all costs (especially at the expense of the former) and hopes to maintain collegial relations with the former. In this way, even the successful Title VII plaintiff is penalized for "bringing the firm down." She is viewed as the villain rather than her harassers.

Remedy of this inequity requires modification to the bankruptcy code. One possibility is to amend section 507 of the bankruptcy code to provide individuals who have been awarded damages against the former firm under Title VII a priority position above other unsecured creditors (including the defendant's law firm).¹⁸² Although this might

181. 11 U.S.C. § 546(a).

182. Section 507 of the bankruptcy code provides a nine-level hierarchy for unsecured creditors. In order, generally, they are (1) expenses incurred in the ordinary course of business that occur between the commencement of an involuntary bankruptcy and the earlier of the appointment of a trustee or grant of the order for relief; (2) employee wages up to \$4,300; (3) contributions to employee benefit plans, up to \$4,300 per employee; (4) claims of farmers and

seem to be unfair to other creditors, such as trade creditors, the extent of their claims is usually a small percentage of the estate. Moreover, it is likely that the former partners of the firm will substantially make up the shortfall with trade creditors because of the continued desire to do business. Another possible amendment that would achieve the same goal is to join the claims of both the plaintiff's and the defendant's attorneys into one, thus ensuring an appropriate prorata distribution between both sides.

Appeals present another set of problems, but can be a riskier proposition for the defendant.¹⁸³ Appeals require appellants to post a bond for the amount of the judgment, an amount that is forfeited in total to the plaintiff should the court of appeals affirm the judgment.¹⁸⁴ Additionally, an affirming court has the discretion to order appellant to pay appellee's attorneys' fees under Title VII.¹⁸⁵ However, should the prevailing plaintiff lose on appeal, the court may order her to pay for the defendant's appeal.¹⁸⁶ Appeals place the plaintiff in a precarious position for two reasons. First, the plaintiff has yet to recover any damages from her judgment, and now must fund additional litigation that could last several years. Second, prevailing plaintiffs lose Title VII appeals in just under 30 percent of cases,¹⁸⁷ and expose themselves to the fees and costs of defendant's appeal when they do. Faced with these two possibilities, the plaintiff is likely to be eager to settle for an amount substantially less than her judgment.

E. What Makes Sexual Harassment Litigation Different?

Litigation, *all* litigation, is painful. Most of it involves the same types of problems presented here: requirements of administrative agencies, problems with statutes of limitations, confidentiality clauses in settlement, invasive discovery, and difficulty in collecting judgments. So what is it that makes sexual harassment litigation against

fishermen, (5) money for rent or purchase of property, up to \$1,950; (6) alimony and child care; (7) taxes; (8) money to maintain the capital of an FDIC institution; and (9) everyone else. 11 U.S.C. § 507.

183. Overall, the federal appeals courts affirm plaintiff's Title VII verdicts in 73% of cases. See Juliano & Schwab, *supra* note 99, at 574.

184. FED. R. APP. P. 7.

185. 42 U.S.C. § 2000e-5(k) (1994) (giving the court discretion to grant attorneys' fees to prevailing parties).

186. *Id.*

187. Juliano & Schwab, *supra* note 99, at 574.

law firms different from other types of Title VII claims? Why is a lawsuit by an attorney against her employer different from other types of David versus Goliath claims?

Sexual harassment litigation against law firms is different for several reasons. First, it is one of only a few types of Title VII litigation that looks to the profession that was the source of the problem to provide the remedy. Only Title VII suits filed by attorneys against their firms on the basis of age or racial discrimination are comparable. Second, plaintiffs in this type of litigation would do almost anything to avoid it, up to and including leaving a profession in which they have invested a great deal. The ethic of care context from which a female attorney experiences harassment primarily focuses on the maintenance of relationships, but no relationship is more important than the one she has with herself. Finally, most of these claims are preventable, and firms have made great progress in the last decade to ameliorate the occurrence of sexual harassment. But policies alone do not change behavior. Policies must have consequences, and these consequences must be enforced. Circumvention of the consequences brings the argument full circle, as the profession that defined the rules is best qualified to know how to break them.

CONCLUSION

It is implausible that a legal professional with a strong ethical compass could read the story of RoxAnne Rochester and not react with disgust, even outrage. One examines what she had to endure and hopes that it represents the worst-case scenario for sexual harassment in the legal profession. That same individual, however, would have to admit a begrudging admiration for how the defendants and their defense counsel litigated their case. The defense of Fishman & Merrick was entirely legal and constituted what one could call "good lawyering." This dichotomy, between simultaneous disgust and begrudging admiration, defines the problem.

One reacts with disgust to Rochester's story not only because of what happened to her, but also because she valued her relationships with her male boss, her male colleagues, her clients, and her profession in a way that was not reciprocated. In fact, the value she placed on these relationships was exploited to her extreme detriment. This resulted in the derailment of what should have been an outstanding career in the law. Her experience is not uncommon, but it is one of too few that is public.

The admiration for Fishman & Merrick's defense team is begrudging because the advantages they enjoyed were gratuitous. As good attorneys, they were skilled at taking advantage of every flaw in the procedural law when they had no chance of succeeding on the merits. Doing so denied Rochester substantive justice and avoided significant consequences for their clients. The same flaws that they exploited in the procedural law are available to other defense firms for similar cases. These flaws do not level the playing field of litigation; they tilt it severely in the favor of law firm defendants.

The ethic of care employed by Rochester and other female attorneys is a resistible force against the immovable object of male dominance of the legal profession. The ethic of care continues to be resisted because it can be resisted. Therefore, the only way to provide a meaningful remedy to sexual harassment is to change the paradigm in a way that addresses the symptoms of the systemic flaws in the process, and thereby imbue value into the ethic of care approach. In other words, the best way to encourage an ethic of care remedy, which is an in-house remedy, is to eradicate the flaws from the procedures of sexual harassment litigation. Doing so will serve notice to perpetrators that the substantive law cannot be circumvented through procedural loopholes. The changes proposed for statutes of limitations, confidentiality clauses, admissibility of evidence, and enforcement of judgments will cure the problem by treating the symptoms.

There can be no justification for our profession, which makes, interprets, and steels our laws, to circumvent those laws through procedural flaws. Elimination of these flaws is the best method for eradicating sexual harassment, for preventing circumvention will encourage prevention. To do so would make us "twice blest."

